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**IN THE
COURT OF APPEALS OF INDIANA**

RICKY D. SMITH,

Appellant-Defendant,

VS.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 20A03-0611-CR-532

APPEAL FROM THE ELKHART CIRCUIT COURT

The Honorable Terry Shewmaker, Judge

Cause No. 20C01-0505-FA-81

May 15, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Judge

Ricky D. Smith appeals his conviction for possession of methamphetamine as a class A felony.¹ Smith raises one issue, which we revise and restate as whether the trial court's instructions to the jury resulted in fundamental error. We affirm.

The relevant facts follow. On May 3, 2005, the Goshen Police Department arranged a controlled drug buy. The \$170 used as the buy money was photocopied before the controlled buy. The buyer went inside a residence in Elkhart County and returned without the buy money. The next day, the police searched the residence pursuant to a search warrant. The police discovered Smith, Sarah Cox, and a three-month-old baby in the bedroom of the residence.

The police recovered \$441, which included the buy money, from Smith's front pocket. The police recovered a clear plastic bag that contained 1.28 grams of methamphetamine from Smith's left front pants pocket. The search of the house revealed various quantities of methamphetamine, methylenedioxymethamphetamine, commonly known as ecstasy, a scale, a ledger, and baggies.

The State charged Smith with: (1) Count I, possession of methamphetamine as a class A felony; (2) Count II, possession of a Schedule I controlled substance as a class D

¹ Ind. Code § 35-48-4-1 (2004) (subsequently amended by Pub. L. No. 151-2006, § 22 (eff. July 1, 2006)).

felony;² and (3) Count III, possession of a schedule II controlled substance as a class D felony.³ The State later dismissed Count III.

At trial, the trial court read preliminary instructions and the charges against Smith to the jury. Specifically, the trial court informed the jury that “[a] person who knowingly possesses with intent to deliver methamphetamine, pure or adulterated, having a weight of three grams or more, commits dealing in methamphetamine, a class A felony.” Transcript at 9. During final instructions, the trial court told the jury that “[b]efore you may convict [Smith] of the class A felony, the [S]tate must have proved each of the following: [Smith] (1) possessed with intent to deliver, (2) methamphetamine, (3) the amount of the methamphetamine weighed three grams or more.” *Id.* at 193. Smith did not object to this instruction. The jury found Smith guilty of possession of methamphetamine as a class A felony and possession of a Schedule I controlled substance as a class D felony.⁴

The trial court sentenced Smith to serve thirty years in the Indiana Department of Correction with five years suspended for his class A felony conviction and one and a half years for his class D felony conviction. The trial court ordered that the sentences be served concurrently.

² Ind. Code § 35-48-4-7 (2004).

³ Ind. Code § 35-48-4-7 (2004).

⁴ Smith does not appeal his conviction of possession of a Schedule I controlled substance as a class D felony.

The sole issue is whether the trial court's instructions to the jury resulted in fundamental error. Smith appears to argue that fundamental error occurred when the trial court instructed the jury as follows during the final instructions:

Before you may convict the defendant of the class A felony, the [S]tate must have proved each of the following: The defendant (1) possessed with intent to deliver, (2) methamphetamine, (3) the amount of the methamphetamine weighed three grams or more.

Transcript at 193. Specifically, Smith argues that the "trial court omitted the requirement that the jury find that the appellant 'knowingly' possessed the methamphetamine." Appellant's Brief at 4. Smith argues that the "juror confusion as to the correct law violated [Smith]'s due process rights and constitutes fundamental error." Id. at 9.

Generally, the manner of instructing a jury lies within the sound discretion of the trial court, and we review the trial court's decision only for an abuse of that discretion. Powell v. State, 769 N.E.2d 1128, 1132 (Ind. 2002), reh'g denied. However, the record does not demonstrate that Smith objected to the jury instructions in question or tendered his own instructions. A defendant waives a claim of error in instructing the jury if he fails to object and tender a competing instruction at trial, unless the alleged error constitutes fundamental error. Wrinkles v. State, 690 N.E.2d 1156, 1171 (Ind. 1997), reh'g denied, cert. denied, 525 U.S. 861, 119 S. Ct. 148 (1998). Thus, Smith has waived any claim of error with respect to the instructions unless the alleged errors rise to the level of fundamental error.

In order to be fundamental, the error must represent a blatant violation of basic principles rendering the trial unfair to the defendant and

thereby depriving the defendant of fundamental due process. The error must be so prejudicial to the defendant's rights as to make a fair trial impossible. In considering whether a claimed error denied the defendant a fair trial, we determine whether the resulting harm or potential for harm is substantial. Harm is not shown by the fact that the defendant was ultimately convicted. Rather, harm is determined by whether the defendant's right to a fair trial was detrimentally affected by the denial of procedural opportunities for the ascertainment of truth to which he would have been entitled.

Ortiz v. State, 766 N.E.2d 370, 375 (Ind. 2002) (internal citations omitted).

When we consider a claim of fundamental error with respect to jury instructions, we look to the jury instructions as a whole to determine if they were adequate. Ringham v. State, 768 N.E.2d 893, 898 (Ind. 2002), reh'g denied. “[J]ustice can be best served by analyzing questions involving jury instructions based on the circumstances of each case to determine whether the defendant received a fair trial rather than summarily concluding that any omission is fundamental error.” Davis v. State, 835 N.E.2d 1102, 1109 (Ind. Ct. App. 2005), trans. denied.

We will first examine the preliminary instructions, which the trial court read to the jury. The trial court informed the jury of Count I by stating:

Count I: The undersigned affiant swears that on or about the 4th day of May, 2005, at the county of Elkhart and state of Indiana, one Ricky D. Smith, did then and there *knowingly* possess, with intent to deliver, a quantity of methamphetamine having an aggregate weight of three grams or more, to wit: approximately seven and five tenths grams; all of which is contrary to the form of Indiana Code section 35-48-4-1; contrary to the form of statute in such cases made and provided; and, against the peace and dignity of the State of Indiana.

Transcript at 8-9 (emphasis added). Preliminary Instruction No. 3 stated:

A person who *knowingly* possesses with intent to deliver methamphetamine, pure or adulterated, having a weight of three (3) grams or more, commits dealing in methamphetamine, a Class A felony.

To convict the Defendant, the State must have proved each of the following elements beyond a reasonable doubt:

The Defendant

1. *knowingly*
2. possessed with intent to deliver
3. methamphetamine (pure or adulterated)
4. the amount of the methamphetamine weighed three (3) grams or more.

If the State failed to prove each of these elements beyond a reasonable doubt, you should find the Defendant not guilty of possession of methamphetamine, with intent to deliver, having a weight of three (3) grams or more, as charged in Count I.

If the State did prove each of these elements beyond a reasonable doubt, you should find the Defendant guilty of possession of methamphetamine in excess of three (3) grams, with intent to deliver, a Class A felony, as charged in Count I.

Appellant's Appendix at 41; Transcript at 9-10 (emphasis added). In Preliminary Instruction No. 8, the trial court defined knowingly as "a person engages in conduct 'knowingly' if, when he engages in the conduct, he is aware of a high probability that he is doing so." Appellant's Appendix at 46.

We now turn to the trial court's final instructions. Final Instruction No. 1 stated:

CONSIDER ALL INSTRUCTIONS

You are to consider all the instructions that are given to you as a whole and you are to regard each with the others given to you.

Do not single out any certain instruction, sentence or any individual point and ignore the others.

The Court has previously given you your preliminary instructions on certain matters of law which were to be considered during the trial, and now gives you your final instructions on the law which are to be considered along with the preliminary instructions in arriving at your verdict.

Id. at 62. Final Instruction No. 2 again stated the allegation in Count I that Smith “*knowingly* possess[ed], with intent to deliver, a quantity of Methamphetamine having an aggregate weight of three (3) grams or more” Id. at 63 (emphasis added). Final Instruction No. 3 stated, in part:

If however you find that the State of Indiana did prove that [Smith],

- 1) *knowingly*
- 2) possessed
- 3) methamphetamine having an aggregate weight of three (3) grams or more but the State of Indiana did not prove that [Smith], had the intent to deliver the methamphetamine; then, you may in the alternative [sic] find [Smith] guilty of the lesser-included offense of Possession of Methamphetamine having a weight of three (3) grams, a Class C felony.

Id. at 65 (emphasis added). Final Instruction No. 7 defined knowingly as “[a] person engages in conduct ‘knowingly’ if, when he engages in the conduct, he is aware of a high probability that he is doing so.” Id. at 69. The instructions, taken as a whole, sufficiently informed the jury that Smith had to act knowingly. Given the instructions as a whole, we conclude that Smith’s claim of fundamental error fails. See, e.g., Gamble v. State, 831 N.E.2d 178, 186 (Ind. Ct. App. 2005) (holding that there was not fundamental error when instructions taken as a whole sufficiently informed the jury of the State’s burden), trans.

denied; Cardwell v. State, 516 N.E.2d 1083, 1086-87 (Ind. Ct. App. 1987) (finding no reversible error where, even though defendant had objected to the instruction, the instructions taken as a whole adequately informed the jury that the defendant must have performed deviate sexual conduct knowingly), reh'g denied, trans. denied.

For the foregoing reasons, we affirm Smith's convictions for possession of methamphetamine as a class A felony and possession of a schedule I controlled substance as a class D felony.

Affirmed.

SULLIVAN, J. and CRONE, J. concur